

# Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations

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Mediation has gained a strong foothold in the courts,<sup>1</sup> administrative agencies<sup>2</sup> and private disputing processes,<sup>3</sup> and those who participate in mediation have received it warmly.<sup>4</sup> This level of acceptance has been

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<sup>1</sup> See DONNA STIENSTRA & THOMAS E. WILLGING, *ALTERNATIVES TO LITIGATION: DO THEY HAVE A PLACE IN THE FEDERAL COURTS?* 3-7 (Federal Judicial Center 1995).

<sup>2</sup> See Administrative Dispute Resolution Act, 5 U.S.C. §§ 581-593 (Supp. II 1996) (encouraging use of dispute resolution in federal agencies); CPR INSTITUTE FOR DISPUTE RESOLUTION, *STREAMLINING REGULATORY LITIGATION* 1-2 (1994); CRAIG A. McEWEN, *AN EVALUATION OF THE EQUAL OPPORTUNITY COMMISSION'S PILOT MEDIATION PROGRAM* iii-iv (1994); DAVID M. PRITZKER & DEBORAH S. DALTON, *NEGOTIATED RULEMAKING SOURCEBOOK* 9-10 (Administrative Conference of the United States 1995).

<sup>3</sup> See NATIONAL INSTITUTE FOR DISPUTE RESOLUTION, *NATIONAL SURVEY FINDINGS ON: PUBLIC OPINION TOWARDS DISPUTE RESOLUTION* 4-5 (1992); Catherine Cronin-Harris, *Mainstreaming: Systematizing Corporate Use of ADR*, 59 ALB. L. REV. 847, 857-858 (1996); Catherine Cronin-Harris & Peter H. Kaskell, *How ADR Finds a Home in Corporate Law Departments*, 15 ALTERNATIVES TO HIGH COST LITIG. 157, 158, 169 (1997).

<sup>4</sup> See STEPHENS CLARK ET AL., *COURT-ORDERED CIVIL CASE MEDIATION IN NORTH CAROLINA: AN EVALUATION OF ITS EFFECTS* 41-46 (1995); JAMES S. KAKLIK ET AL., *AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT* 49-51 (Rand 1996); ROBERT A. LOWE ET AL., *MIDDLESEX COUNTY MULTI-DOOR COURTHOUSE EVALUATION PROJECT* xxvii-xxviii, xxx-xxxi (1992); NATIONAL SYMPOSIUM ON COURT-CONNECTED DISPUTE RESOLUTION RESEARCH: A REPORT ON RECENT RESEARCH FINDINGS—IMPLICATIONS FOR COURTS AND FUTURE RESEARCH NEEDS 9, 25, 55, 63-66, 98 (Susan Keilitz ed., 1993) [hereinafter NATIONAL SYMPOSIUM]; Joan B. Kelly, *A Decade of Divorce Mediation Research: Some Answers and Questions*, 34 FAM. & CONCILIATION CTS. REV. 373, 376

achieved quickly; only twenty years ago, mediation was rarely employed in this country outside the collective bargaining context.<sup>5</sup> At the same time,

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(1996); David Seibel, *To Enhance the Operation of Government: Reauthorizing the Administrative Dispute Resolution Act*, 1 HARV. NEG. L. REV. 239, 242-243 (1996); Kent Snapp, *Five Years of Random Testing Shows Early ADR Successful*, DISP. RESOL. MAG., Summer 1997, at 16, 16-17. See generally Jeanne M. Brett et al., *The Effectiveness of Mediation: An Independent Analysis of Cases Handled by Four Major Service Providers*, 12 NEGOTIATION J. 259 (1996).

<sup>5</sup> See NANCY H. ROGERS & CRAIG A. MCEWEN, *MEDIATION: LAW, POLICY & PRACTICE* §§ 5:02-5:03 (2d ed. 1994 & Supp. 1997). See generally LINDA SINGER, *SETTLING DISPUTES* (1994). In the 1970s, the National Institute of Justice gave four seed grants for community mediation programs. See COOK ET AL., *NEIGHBORHOOD JUSTICE CENTERS FIELD TEST* 20-23 (1980). See generally LINDA SINGER, *SETTLING DISPUTES* (1994). Over 500 programs in New York and other states now mediate tens of thousands of disputes. See Telephone Interview with Larry Ray, Executive Director, National Association of Family and Community Mediators (Jan. 26, 1998) (estimating, based on sampling, that 19,500 mediators in 550 community mediation programs mediate 45,500 cases per year). Their exit surveys indicate appreciative disputants. See DANIEL MCGILLIS, *COMMUNITY MEDIATION PROGRAMS: DEVELOPMENTS AND CHALLENGES* 53-61 (1997). Domestic relations courts in California and Maine began requiring participation in mediation in contested cases involving children in the 1980s. See CAL. CIV. CODE § 4607 (West 1983 & Supp. 1985) (effective 1981); ME. REV. STAT. ANN. tit. 19 § 752 (West Supp. 1994); Michelle Deis, *California's Answer: Mandatory Mediation of Child Custody and Visitation Disputes*, 1 OHIO ST. J. ON DISP. RESOL. 149, 152 (1985); Craig A. McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1357 (1995). Now a tenth of the nation's domestic relations courts make mediation a part of their procedures. See Jessica Pearson, *Family Mediation*, in NATIONAL SYMPOSIUM ON COURT-CONNECTED DISPUTE RESOLUTION RESEARCH, *supra* note 4, at 55. Divorcing parents attending the sessions would usually recommend mediation to their friends. See generally DESMOND ELLIS & NOREEN STUCKLESS, *MEDIATING AND NEGOTIATING MARITAL CONFLICTS* 96 (1996); Kelly, *supra* note 4. All federal appellate courts, except the Federal Circuit, and a sprinkling of state appellate courts mediate a portion of their cases, with positive reactions to mediation even at that rarefied level. See ROBERT J. NIEMIC, *MEDIATION & CONFERENCE PROGRAMS IN THE FEDERAL COURTS OF APPEALS* 2-3 (Federal Judicial Center 1997); Susan FitzGibbon, *Appellate Settlement Conference Programs: A Case Study*, 1993 J. DISP. RESOL. 57, 59-61. This is merely the beginning of a long list. In many other settings, mediation use has emerged and grown over two decades. See ROGERS & MCEWEN, *supra*, §§ 5:02-5:03, 12:01-12:14. Positive reactions by mediation users can be found across the landscape of disputes and institutions. See *MEDIATION AND CRIMINAL JUSTICE: VICTIMS, OFFENDERS AND COMMUNITY* 1, 1-3 (Martin Wright & Burt Galloway eds., 1989); JOHN S. MURRAY ET AL., *PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS* 293-435 (2d ed. 1996); LEONARD RISKIN, *THE FARMER-LENDER MEDIATION*

however, disputing has not changed for most Americans; they litigate in courts that do not encourage mediation, do not hear about mediation from their lawyers and have no community mediation program nearby.<sup>6</sup>

In this Article, we examine what effects a change in law could have on expanding or eroding the mediation foothold attained over the last two decades. The issue is timely. The decision of the National Conference of Commissioners of Uniform State Laws and the American Bar Association Section on Dispute Resolution to draft a model or uniform law regarding mediation, which is the impetus for this symposium issue, offers an opportunity to propose changes in the law that will result in expanded and more effective use of mediation. Based on results of two new studies, we argue that provisions authorizing courts and agencies to require mediation represent a promising means to encourage two results: (1) lawyers will more often refer clients to mediation, even when not required to do so; and (2) lawyers more frequently will promote early settlement with the clients participating in settlement discussions, even when negotiations are conducted without a mediator. These results accord with prevailing legal policy, which favors expedited settlement and increasingly endorses party participation in the processes of disputing.<sup>7</sup> The prospect that increasing mediation use also may have significant ramifications for prevailing legal policy underscores the importance of considering mediation use in the drafting of the uniform or model statute.

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PROGRAM: IMPLEMENTATION BY THE FARMERS HOME ADMINISTRATION 22 (Administrative Conference of the United States 1991); MARK UMBREIT, *MEDIATING INTERPERSONAL CONFLICTS* 135-162 (1995); Glenda L. Cottam, *Mediation and Young People: A Look at How Far We've Come*, 29 CREIGHTON L. REV. 1517, 1535-1536 (1996); Thomas Stipanowich, *Beyond Arbitration: Innovation and Evolution in the United States Construction Industry*, 31 WAKE FOREST L. REV. 65, 75-78 (1996).

<sup>6</sup> Most divorcing parents file in a domestic relations court that does not encourage mediation. See Pearson, *supra* note 5, at 55 (indicating that only a tenth of domestic relations disputes are mediated). Most clients do not hear about mediation from their lawyers. See Roselle Wissler, *Ohio Attorneys' Experience with and Views of Alternative Dispute Resolution Procedures 1* (Mar. 1996) (on file with authors) [hereinafter *Ohio Attorney Survey*]. Most neighbors in a spat have no community mediation program nearby. See Telephone Interview with Larry Ray, *supra* note 5 (indicating only 550 community mediation programs nationwide). Most civil cases are litigated and settled in traditional ways. See Deborah R. Hensler, *Puzzling Over ADR: Drawing Meaning from the Rand Report*, DISP. RESOL. MAG., Summer 1997, at 8, 8-9. In other words, mediation use remains low—despite its impressive growth—when considered in relation to the total number of cases in our courts.

<sup>7</sup> See *infra* text accompanying notes 8-21.

This Article begins with a discussion about legal policy regarding expanded use of mediation. Part I traces public support for settlement itself, for expediting settlement so that it occurs earlier in the dispute and for involvement of the parties themselves in the resolution of their disputes. Part II examines findings from a new study of corporate disputing and from research among Ohio lawyers in an effort to explore what factors influence disputing attorneys to recommend mediation, to expedite settlement discussions and to involve their clients directly in the negotiations. Part III discusses the direct and indirect effects of laws on mediation use and the conduct of negotiations. The discussion addresses laws that compel or excuse participation in mediation, set qualifications and standards for mediators, enhance enforcement for mediation clauses and mediated agreements, recognize duties for lawyers to discuss mediation with clients and authorize use of mediation for particular types of cases. Part IV gives a recipe for statutory provisions that promote mediation use.

This Article focuses on promoting the use of mediation and effective negotiation. Its advice must be tempered because provisions that might advance these purposes could at the same time undermine other important public policy goals. These other aims, such as fairness, access to justice and increased settlements in mediation, topics of other articles in this symposium, sometimes should trump the goal of promoting greater use of mediation.

## I. LEGAL POLICY FAVORING EXPANSION OF MEDIATION USE

Legal provisions that promote mediation do so as a means to the larger end of supporting particular approaches to settlement. American courts and legislatures traditionally place legal policy on the side of settlement, despite some criticism from scholars.<sup>8</sup> As discussed below, recent rulings recognize that legal policy favors expediting settlement so that it occurs earlier in the dispute.<sup>9</sup> There also is some recognition in statutes of a desire

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<sup>8</sup> See Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1073-1075 (1984); Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1, 3-4 (1993); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 553-554 (1986); Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 214-216 (1995).

<sup>9</sup> See *infra* text accompanying notes 26-28.

to increase participation by the real parties in interest in the process leading to resolution of their disputes.<sup>10</sup> This desire to encourage early settlement, and occasionally to increase party participation in the resolution of their disputes, underlies a legal policy promoting expanded use of mediation.

The Federal Rules of Civil Procedure, according to the United States Supreme Court, evidence a "clear policy of favoring settlement of all lawsuits."<sup>11</sup> When discussing the policy favoring settlement, the federal courts refer particularly to Federal Rule of Civil Procedure 68, regarding offers of settlement,<sup>12</sup> and to Rule 16, which was amended in 1993 to expand provisions regarding settlement conferences and dispute resolution.<sup>13</sup> In addition, the courts cite Federal Rule of Evidence 408, which excludes evidence of compromise discussions when offered to prove liability or amount of the claim, as an indication of the legal policy favorable to compromise.<sup>14</sup> Aside from these rules, law professors Samuel Gross and Kent Syverud argue that the value of "preference for private ordering" in dispute resolution is evidenced not only by court rulings or rules of procedure but also by the structure of the litigation system, specifically that the justice system has few judges, many lawyers, an adversarial presentation of evidence and a jury trial.<sup>15</sup>

Some commentators contend that the courts promote settlement only to reduce their dockets,<sup>16</sup> but the courts themselves justify the policy in other ways as well. Justice Thurgood Marshall, in the dissent to a civil rights

<sup>10</sup> See *infra* text accompanying notes 130–131.

<sup>11</sup> *Marek v. Chesny*, 473 U.S. 1, 10 (1985).

<sup>12</sup> See, e.g., *id.*

<sup>13</sup> See FED. R. CIV. P. 16; see, e.g., *Munford, Inc. v. Munford, Inc.*, 97 F.3d 449, 455 (11th Cir. 1996); *Newton v. Keene Corp.*, 918 F.2d 1121, 1126 (3d Cir. 1990); *G. Heileman Brewing v. Joseph Oat Corp.*, 871 F.2d 648, 652 (7th Cir. 1989).

<sup>14</sup> See, e.g., *Bank of Am. Nat'l. Trust and Sav. Ass'n v. Hotel Rittenhouse Associates*, 800 F.2d 339, 344 (3d Cir. 1986); *Cornell Co. v. Septa*, 1996 WL 689097, at \*1 (E.D. Pa. Nov. 26, 1996); *Tribune Co. v. Purcigliotti*, 1996 WL 337277, at \*1 (S.D.N.Y. June 19, 1996); *Young v. State Farm Mut. Auto. Ins. Co.*, 169 F.R.D. 72, 76 (S.D. W.Va. 1996).

<sup>15</sup> Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 4 (1996).

<sup>16</sup> See Owen Fiss, *Out of Eden*, 94 YALE L.J. 1669, 1669 (1985); Lucy V. Katz, *Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster or Two Sides of a Coin?*, 1993 J. DISP. RESOL. 1, 50; Glen Newman, *the summary Jury Trial as a Method of Dispute Resolution in Federal Courts*, 1990 U. ILL. L. REV. 177, 177 (attributing this motive to the legal profession).

case, commented eloquently that "it would defy equity to penalize those who achieve harmony from discord, as it would defy wisdom to impose on society the needless cost of superfluous litigation."<sup>17</sup> The New York Court of Appeals gave a more detailed explanation of the rationale for favoring settlement:

A negotiated compromise of a dispute avoids potentially costly, time-consuming litigation and preserves scarce judicial resources; courts could not function if every dispute devolved into a lawsuit. Moreover, there is a societal benefit in recognizing the autonomy of parties to shape their own solution to a controversy rather than having one judicially imposed. Additionally, a settlement produces finality and repose upon which people can order their affairs.<sup>18</sup>

Also, adoption of statutes encouraging mediation use for disputes not headed for litigation evidences a support for private ordering for reasons other than judicial economy. Examples include statutory provisions for mediation of collective bargaining,<sup>19</sup> gang<sup>20</sup> and public policy disputes.<sup>21</sup>

Legal policy does not favor settlement at any cost, however. The courts treat the policy favoring settlement as one that should yield to other important interests.<sup>22</sup> For example, the courts have given priority to the importance of public access to court proceedings and also to a party's need for evidence, when these interests are weighed against the need to promote settlement through protection of secrecy.<sup>23</sup> Similarly, the courts have

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<sup>17</sup> *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 305 (1986) (Marshall, J., dissenting).

<sup>18</sup> *Denburg v. Paker Chapin Flattau & Klimpl*, 624 N.E.2d 995, 1000 (N.Y. 1993); *see also* *Brown v. Advantage Eng'g, Inc.*, 960 F.2d 1013, 1017 (11th Cir. 1992) (Emondson, J., dissenting); *Bank of Am. Nat'l. Trust and Sav. Ass'n.*, 800 F.2d at 344.

<sup>19</sup> *See, e.g.*, 29 U.S.C. §§ 171(a) & (b) (1994); *NLRB v. Joseph Macaluso*, 618 F.2d 51, 54 (9th Cir. 1980).

<sup>20</sup> *See, e.g.*, CAL. PENAL CODE § 13826.6 (West Supp. 1998); FLA. STAT. ANN. §§ 985.21, 985.413 (West Supp. 1998).

<sup>21</sup> *See, e.g.*, FLA. STAT. ANN. § 186.022(5), 186.509 (West 1997 & Supp. 1998); N.J. STAT. ANN. §§ 52:27E-73, 52:27D-9 (West Supp. 1997); N.M. STAT. ANN. § 4-38-39 (Michie Supp. 1992).

<sup>22</sup> *See, e.g.*, *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 211-216 (1994) (weighing policy encouraging settlement against equitable allocation of liability among joint tortfeasors).

<sup>23</sup> *See, e.g.*, *Brown*, 960 F.2d at 1060; *Hulse v. A.B. Dick Co.*, 606 N.Y.S.2d

## DIRECT AND EARLY NEGOTIATIONS

elevated the need to limit "pressure tactics to coerce settlement"<sup>24</sup> over support for compromise. They have opted for the maintenance of open channels to enforcement agencies over encouragement to settle.<sup>25</sup> The courts in many ways temper their support of settlement, just as the goal of increasing use of mediation should be tempered by the need to preserve fairness and other values.

A detailed assessment also indicates that courts and legislatures also support particular approaches to settlement. They encourage early settlement, for example.<sup>26</sup> The Supreme Court recently commented on the "judicial economics" secured by earlier settlement.<sup>27</sup> The Ninth Circuit has recognized the importance of earlier settlement in the collective bargaining context where delay contributed to economic disarray.<sup>28</sup> Some mediation statutes explicitly support moving up the time of settlement for cases in litigation or agency processes.<sup>29</sup> Mediation often has not been shown to increase settlement rates, but research in a number of settings indicates that mediation can move up the average time of settlement.<sup>30</sup> Bryant Garth cites this support for dispute resolution processes whose primary effect is to expedite settlement as evidence of a legal policy "to promote relatively *quick* settlements so that the costs of discovery are limited."<sup>31</sup> Support for

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424, 427-428 (N.Y. Sup. Ct. 1997).

<sup>24</sup> Kothe v. Smith, 771 F.2d 667, 669 (2d Cir. 1985).

<sup>25</sup> See, e.g., Equal Employment Opportunity Comm'n v. Astra USA, Inc., 94 F.3d 738, 744 (1st Cir. 1996); Hamad v. Graphics Arts Ctr., Inc., 72 Fair Empl. Prac. Cas. (BNA) 759, 759 (D. Ore. Jan. 3, 1997).

<sup>26</sup> See, e.g., Newton v. Keene Corp., 918 F.2d 1121, 1126 (3d Cir. 1990).

<sup>27</sup> See U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18, 28, (1994).

<sup>28</sup> See N.L.R.B. v. Joseph Macaluso, Inc., 618 F.2d 51, 54 (9th Cir. 1980).

<sup>29</sup> See 28 U.S.C. §§ 471, 473 (1994) (stating purpose of Dispute Resolution Act is to provide inexpensive and expeditious settlement); ALASKA STAT. § 25.20.080(a) (Michie 1996) (requiring early scheduling of child custody mediation); CAL. CIV. PROC. CODE § 1775(d) (West Supp. 1998) (stating that mediation has "greatest benefit . . . when used early, before substantial discovery and other litigation costs have been incurred."); ME. REV. STAT. ANN. tit. 5, § 3341(1) (West Supp. 1997) (indicating use of mediation as method of promptly settling disputes between private landowners).

<sup>30</sup> See NATIONAL SYMPOSIUM, *supra* note 4, at 8, 61-62; McEwen, *supra* note 5, at 1373 ("Although mandated divorce mediation in Maine seems to encourage earlier settlements, it does not typically replace trials.").

<sup>31</sup> Bryant G. Garth, *Privatization and the New Market for Disputes: A Framework for Analysis and a Preliminary Assessment*, 12 STUD. IN L., POL. & SOC'Y 367, 369

an increase in use of mediation therefore can be tied to a legal policy of expediting, not just encouraging, settlement.

Commentators argue that another typical aspect of mediation, direct involvement of the parties in negotiation, also should be a component of legal policy regarding settlement,<sup>32</sup> and there may be early signs of a recognition of this. In interpreting Federal Rule of Civil Procedure Rule 16's provisions regarding party attendance at settlement conferences, the Seventh Circuit, sitting en banc, ruled that parties could be compelled to attend the conference.<sup>33</sup> The court's rationale rested more heavily on attendance as a means to increase settlement prospects than as a separate value.<sup>34</sup> Some statutes, nonetheless, recognize the value of party participation as an independent basis for promoting mediation.<sup>35</sup> These statutes seem to follow a vision set out in a policy document issued in 1983: "Enthusiasm for a wider range of dispute resolution is tied . . . to a hope that new methods will not only reduce the burden on the courts and the economy, but will provide more satisfying means to justice for a larger portion of the population."<sup>36</sup>

Statutory encouragement of greater mediation use, particularly if mediation is scheduled early in the disputing process and involves both parties and lawyers, is consistent with a more general legal policy favoring

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(1992).

<sup>32</sup> See E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 101-106 (1988) (arguing, generally, that the opportunity to speak enhances one's experience of procedural fairness); STIENSTRA & WILLGING, *supra* note 1, at 19-22; E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 L. & SOC'Y REV. 953, 980-983 (1990) (asserting that procedural formality enhances the parties' satisfaction with the proceeding); see also Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation*, 41 FLA. L. REV. 253, 272 (1989) (urging a role for mediation that requires party participation).

<sup>33</sup> See *G. Heileman Brewing Co v. Joseph Oat Corp.*, 871 F.2d 648, 656-657 (7th Cir. 1989).

<sup>34</sup> See *id.* at 652-653.

<sup>35</sup> See, e.g., CAL. PENAL CODE § 14150 (indicating value of direct participation in victim-offender mediation) (West Supp. 1997); CAL. PENAL CODE § 4(4)(a) (West Supp. 1997) (ensuring party participation); CAL. CIV. PROC. CODE § 1775(c) (West 1993) (supporting mediation as providing "greater opportunity to participate directly in resolving these disputes.").

<sup>36</sup> NATIONAL INSTITUTE FOR DISPUTE RESOLUTION, *PATHS TO JUSTICE: MAJOR PUBLIC POLICY ISSUES OF DISPUTE RESOLUTION* 8 (1984).



expedited settlement and, increasingly, involvement of the parties in the resolution of their disputes. The means through which a statute encourages greater use of mediation of this type has not been clear, however. Before discussing how particular provisions in a uniform or model mediation law might affect mediation use, this Article examines more closely, through two studies of disputing, what has worked, and not worked, to change the timing and frequency of mediation use.

## II. WHAT PRODUCES CHANGE? A STORY OF CORPORATE DISPUTING AND LAWYER ATTITUDES

Businesses are the classic “repeat players” in the legal system,<sup>37</sup> and attorneys are key sources of guidance to those involved in many types of disputes.<sup>38</sup> When legal historian Jerold Auerbach disparaged the benefits of mediation in 1983, he argued that mediation failed what he must have assumed to be an important barometer of merit, saying, “[b]ar associations do not recommend that corporate law firms divert *their* clients to mediation.”<sup>39</sup> Of course, fifteen years later, we know that bar associations *are* recommending mediation to corporate law firms;<sup>40</sup> that about a tenth of lawyers regularly recommend mediation to corporate and other clients;<sup>41</sup> and that corporations use mediation in about eight percent of cases.<sup>42</sup> But while Auerbach was wrong about what the barometer’s reading would be, he was correct about the barometer that others would trust. Corporate

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<sup>37</sup> See Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & Soc’y REV. 95, 97–104 (1975).

<sup>38</sup> See John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 839, 890–894 (1997); Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 L. & Soc’y REV. 525, 543, 561 (1980–81) (noting that, while few individuals actually consult with attorneys, those that do rely on them significantly); Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 36–41 (1982).

<sup>39</sup> JEROLD AUERBACH, *JUSTICE WITHOUT LAW?* 144 (1983).

<sup>40</sup> The American Bar Association has sponsored a number of conferences on business use of mediation. See, e.g., DISP. RESOL. MAG., Fall 1997, at inside cover; DISP. RESOL. MAG., Fall 1994, at inside cover; Bruce E. Meyerson, *ADR Committees Update*, DISP. RESOL. MAG., Spring 1994, at 11.

<sup>41</sup> See Ohio Attorney Survey, *supra* note 6, at 1.

<sup>42</sup> See generally Richard J. Klimoski et al., *Non-Binding Dispute Resolution for Business Disputes? Corporate Counsel Are of Two Minds* (1993) (unpublished manuscript on file with authors).

parties have the resources, incentive and experience to decide whether mediation is useful.<sup>43</sup> Lawyers have the experience to decide and the reliance of their clients to promote mediation use.<sup>44</sup> If lawyers and corporations make expanded use of mediation, others will pay attention.<sup>45</sup> We can better assess the likelihood of expanded use of mediation if we understand what produced the change among lawyers and corporations.

Our insights about change among lawyers and corporate parties are based on two collaborative research efforts. The first was a qualitative and quantitative study, supported by the National Science Foundation, of the handling of cases involving litigation or threatened litigation between businesses by the legal departments of six large national corporations.<sup>46</sup> In the business disputes that we studied, four of the corporations used mediation in only 10% to 15% or fewer; one in 30%; and one in 40%.<sup>47</sup> We examined about 30 business-to-business cases in each corporation and spoke with counsel and business principals involved in the cases. The second study, supported by the William and Flora Hewlett Foundation, involved exit surveys from mediators, parties and lawyers in 600 mediated

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<sup>43</sup> For an empirical study of private dispute resolution, see Brett et al., *supra* note 4, at 267.

<sup>44</sup> See Lande, *supra* note 38, at 879-880, 889-892 (describing extensive influence by lawyers on clients and the mediation process, especially as lawyers become more experienced in the mediation process).

<sup>45</sup> See A REPORT FROM THE PRESIDENT'S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA 15 (1991) (listing lawyers and business leaders, as well as government officials, as keys to influencing whether there will be expanded voluntary use of dispute resolution).

<sup>46</sup> The research [hereinafter Corporate Study] was done by Professor Craig A. McEwen, Richard J. Klimoski, Nancy H. Rogers and Philip C. Sorensen, with research assistance from Mary Courtney. After a national survey of corporate counsel, the researchers selected six large national corporations, four of which had a reputation for more extensive use of mediation than was typical. The six corporations agreed to share case documents and information with the understanding that the researchers would not divulge identities of the companies studied or open the files to those not involved in the research. In 1993-1995, researchers reviewed files and interviewed lawyers and principals in these corporations regarding about 30 business-to-business cases in each company, interviewed general counsel and conducted paper surveys of in-house counsel.

<sup>47</sup> We cannot claim that the disputes we studied were a random sample of all business-to-business disputes or that these percentages generalize to the universe of business-to-business cases in each company. However, the percentages reflect the mediation use of these companies.

cases in four Ohio counties,<sup>48</sup> and surveys returned by 2300 Ohio attorneys from among 5000 attorneys randomly selected from those licensed to practice law in the state.<sup>49</sup> The survey effort was collaborative among The Ohio State University faculty and the Supreme Court of Ohio Committee on Dispute Resolution; the data were analyzed by research psychologist Roselle Wissler.<sup>50</sup>

The Ohio lawyer survey results highlight the fact that lawyers favoring use of mediation do not always refer even a significant portion of their clients to mediation.<sup>51</sup> Most lawyers favored expanded use of mediation<sup>52</sup> but only about a tenth of these lawyers regularly recommended it to clients.<sup>53</sup>

In the corporate context, we observed several corporations that failed to increase use of mediation even though the business principals supported it, the lawyers favored it and the general counsel had encouraged lawyers to initiate mediation more frequently.<sup>54</sup> Five of the six corporations had signed a Center for Public Resources Institute for Dispute Resolution pledge to use dispute resolution processes such as mediation, but mediation use remained at similar levels for three of these companies as in the corporation declining to sign the pledge.<sup>55</sup> The lawyers spoke well of mediation in four companies, but only two of these utilized mediation more frequently than the companies in which the lawyers disparaged mediation.<sup>56</sup> A more specific directive by general counsel to try mediation also failed in two of

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<sup>48</sup> See Roselle L. Wissler, Evaluation of Settlement Week Mediation (Oct. 1997) (unpublished manuscript on file with authors) [hereinafter Settlement Week Survey].

<sup>49</sup> See Ohio Attorney Survey, *supra* note 6, at 3.

<sup>50</sup> See *id.* The Ohio Data Project was a cooperative program involving the Supreme Court of Ohio Dispute Resolution Committee and Professors Jeanne Clement, L. Camille Hébert, Richard J. Klimoski, Craig A. McEwen, Nancy H. Rogers, Andrew I. Schwebel and Charles E. Wilson.

<sup>51</sup> See *id.* at 1-4.

<sup>52</sup> See *id.* at 9.

<sup>53</sup> See *id.* at 7. Twelve percent often referred clients to mediation. See *id.*

<sup>54</sup> See Corporate Study, *supra* note 46.

<sup>55</sup> See *id.* Lawyers in two of the companies that had signed the CPR pledge did not know whether their company was a signatory to the pledge. See CPR CORPORATE POLICY STATEMENT ON ALTERNATIVES TO LITIGATION REGISTRY OF SUBSCRIBERS (CPR Institute for Dispute Resolution 1995) (listing corporations pledging to pursue ADR in disputes with others that signed the pledge).

<sup>56</sup> See Corporate Study, *supra* note 46.

the four companies,<sup>57</sup> with the use of mediation remaining the same as in the corporations without a general counsel directive.<sup>58</sup> Four of the corporations had pursued a variety of educational programs on ADR, with no noticeable effects on its use in two corporations.<sup>59</sup> The general counsel in the company with most frequent mediation use told researchers that he had initially issued a request to increase use of mediation and had been met with no increase in use. Reflecting back, he commented, "I cannot think of an initiative that was harder to sell. Lawyers generally were resistant to the spread of ADR within the company."<sup>60</sup>

Although our interviews indicated several sources of resistance to actual use among those favoring mediation, we found in both the Ohio and corporate studies that experience attending mediation sessions helped to overcome these sources of resistance.<sup>61</sup> One source of hesitancy to use mediation, even among those lawyers favorably disposed, was the conventional wisdom that attorneys in substantial cases should delay settlement discussions until after formal discovery had been completed.<sup>62</sup> Only incentives that dealt directly with that hesitancy or greater experience with mediation scheduled early in the dispute seemed sufficient to change the belief of lawyers that they were acting irresponsibly in engaging in settlement discussions early in the case.<sup>63</sup> One lawyer in a company that had not increased mediation use, despite a directive from general counsel, commented, "I have never settled a case in mediation. This is so because these [business] cases involve a great deal of discovery and once discovery is complete people just want to go to trial. People are unwilling to resolve cases without all the facts and thus extensive discovery."<sup>64</sup> Another explained, "In the U.S. the use of discovery will never diminish because it's tradition. . . . We don't want to deal at a disadvantage with our

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<sup>57</sup> *See id.*

<sup>58</sup> *See id.*

<sup>59</sup> Strategies for change are discussed in Cronin-Harris, *supra* note 3, at 866-871. *See generally* MAINSTREAMING: INSTITUTIONALIZING CORPORATE ADR (CPR Institute for Dispute Resolution 1984) (presenting case studies on the strategies used by several companies to institutionalize the use of mediation and other dispute resolution processes).

<sup>60</sup> Corporate Study, *supra* note 46.

<sup>61</sup> *See* Ohio Attorney Survey, *supra* note 6, at 2, 4.

<sup>62</sup> *See* Corporate Study, *supra* note 46.

<sup>63</sup> *See id.*

<sup>64</sup> *Id.*

opponent.”<sup>65</sup>

Taking the opposite view, the general counsel in the company using mediation for forty percent of the business cases rejected the conventional wisdom regarding discovery. He commented, “Attorneys want 100 percent of the information before advising on settlement. CEOs make decisions [involving as much money] based on 30 percent of the information. We lawyers should put ourselves on a diet concerning our information needs.”<sup>66</sup> The general counsel explained that a major shift toward use of mediation did not occur until he required attorneys to give their supervisors a written explanation each time that they used formal discovery before trying mediation.<sup>67</sup> In effect, the general counsel changed the conventional wisdom about what was responsible representation by indicating that it was irresponsible to spend the client’s money on formal discovery without a strong likelihood that the expenditure would materially improve the result.

Interviewed after the shift to mediation, lawyers in the forty percent mediation company discounted the conventional wisdom of their counterparts in other corporations, emphasizing in place of formal discovery both informal investigation and the exchange of information that can occur as a part of the mediation process.<sup>68</sup> These lawyers scheduled mediation earlier and had a higher settlement rate in mediation than their counterparts in the other companies.<sup>69</sup> In fact, they became so convinced of the efficacy of this approach that they extended it to negotiations occurring without mediator involvement, and they began scheduling negotiation sessions earlier.<sup>70</sup> The company using mediation most often in business-to-business cases achieved settlement an average of ten months earlier than achieved in the four companies using mediation least frequently.<sup>71</sup>

A similar lesson comes from the Ohio mediation exit survey study. That research demonstrates that cases scheduled for mediation prior to

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *See id.* For advice about incentives for attorneys, see CATHERINE CRONIN-HARRIS, BUILDING ADR INTO THE CORPORATE LAW DEPARTMENT 36–39 (CPR Institute for Dispute Resolution 1997).

<sup>68</sup> *See* Corporate Study, *supra* note 46.

<sup>69</sup> *See id.*

<sup>70</sup> *See id.*

<sup>71</sup> *See id.* The company using mediation in 30% of the business-to-business cases achieved settlement an average of two months earlier than the four companies using mediation in only 10–15% of their cases.

completion of formal discovery were as likely to settle as those scheduled after completion.<sup>72</sup> Lawyers responded in the exit surveys favorably to the mediation, even when scheduled early.<sup>73</sup> Apparently, these lawyers felt comfortable with the exchange of information once in the mediation. Experience persuaded them that the conventional wisdom about completing discovery before negotiating in earnest was not always valid.

Both the corporate and Ohio studies indicate another source of resistance to mediation in addition to concerns about discovery—the mediator's tendency to include clients at the session. Lawyers in corporations with little mediation use hesitated to try mediation because clients would participate, warning about trouble when clients were present for negotiations.<sup>74</sup> In a typical reaction, one lawyer said, "The fewer people who get involved the better. You don't want a mediation session where superiors and subordinates have to discuss things that they would rather not have [others hear]."<sup>75</sup> In the companies that used mediation only occasionally, the business principals acknowledged their noninvolvement in negotiations and spoke of "handing over" cases to lawyers.<sup>76</sup> Said one general manager of a division, "Once lawyers get involved you lose control. They may be right legally but it's bad for business."<sup>77</sup>

In contrast, lawyers in the company using mediation most often spoke favorably of client involvement in mediation.<sup>78</sup> They commented that they had been so positively impressed by the importance of client involvement in mediation that they had changed their approach in negotiations without a mediator to include clients there as well.<sup>79</sup> In fact, their clients attended negotiation sessions or mediation in 60% of their cases, whereas clients attended only 27% of the negotiation sessions or mediation in the other companies.<sup>80</sup> Once again, what appears to have changed the conventional wisdom in part was experience in mediation.

In the company employing mediation most frequently, the business

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<sup>72</sup> See Settlement Week Survey, *supra* note 48, at ii, 33, 37–38.

<sup>73</sup> See *id.*

<sup>74</sup> See Corporate Study, *supra* note 46.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> See *id.*

<sup>79</sup> See *id.*

<sup>80</sup> See *id.*

principals' comments reflected a different view of typical client-lawyer relations. They assumed that they would not relinquish control of the cases when they involved lawyers.<sup>81</sup> One executive said, regarding relations with lawyers, "I like lawyers. They're trained to be objective. . . . They keep my feet on the ground. . . . As soon as I smell a dispute I get the lawyers involved. I listen to their advice and their suggested strategies regarding disputes."<sup>82</sup>

The Ohio surveys also indicate that lawyers have become comfortable with the client presence that occurred in nearly all mediation sessions.<sup>83</sup> The Ohio lawyers responded favorably to the mediation sessions and, in fact, one of the reasons often given for nonsettlement was that a key party was not present.<sup>84</sup>

The corporate and the Ohio studies thus support a view of change that relies heavily upon getting lawyers into early mediation sessions.<sup>85</sup> Experience in mediation was the strongest predictor of whether Ohio lawyers would refer clients to mediation, much stronger than their having attended courses in dispute resolution.<sup>86</sup> So, too, in a survey of corporate counsel, those who experienced court-ordered mediation or neutral evaluation were more likely to suggest mediation to clients.<sup>87</sup>

Not only does direct experience in mediation change views of its appropriateness, so also does legitimizing mediation in the relevant community. In-house lawyers' views toward mediation tended to be similar within each company that we studied.<sup>88</sup> In the same vein, Ohio lawyers referred clients to mediation thirteen percent more often if a court within their county had a mediation program.<sup>89</sup> In another study, law professor

<sup>81</sup> *See id.*

<sup>82</sup> *Id.*

<sup>83</sup> *See* Ohio Attorney Survey, *supra* note 6, at 11 (indicating that less than 13% believed mediation "over-involves clients").

<sup>84</sup> *See id.* at Appendix—Attorneys' Comments; Settlement Week Survey, *supra* note 48, at 7, 11–12.

<sup>85</sup> *See supra* text accompanying notes 62–71.

<sup>86</sup> *See* Ohio Attorney Survey, *supra* note 6, at 2, 3, 16, 27.

<sup>87</sup> *See* Klimoski et al., *supra* note 42.

<sup>88</sup> *See generally* Corporate Study, *supra* note 46. The strongest internal agreement was among counsel in the two companies that most often used mediation and in the two companies in which the general counsel did not favor expanded use of mediation. *See id.*

<sup>89</sup> *See* Ohio Attorney Survey, *supra* note 6, at 14.

Thomas Stipanowich also noted a quick change in attorneys' attitudes toward mediation in the construction sector once mediation use for those disputes became well-known.<sup>90</sup> These results suggest that use of mediation by some lawyers in a practice community influences others within that community.

Other explanations of lawyer resistance to referring clients to mediation deserve note. Elsewhere, commentators attribute this reluctance to the lawyers' desire to maximize fees or their ingrained adversarial personalities.<sup>91</sup> We do not completely discount these explanations, but argue that they are incomplete. Salaried in-house counsel in our study were reluctant to refer to mediation, but they had no economic interest in resisting.<sup>92</sup> Counsel for insurance defense and professional negligence parties in Ohio referred clients to mediation at about the same rates, despite probable differences in fee structures and therefore financial incentives.<sup>93</sup> Further, as discussed above, once experienced in mediation, lawyers in all sectors are more likely to become mediation boosters, even though their personalities and the economic consequences for them do not change.<sup>94</sup>

Although we discount the adversarial explanation in particular and give less weight to the fee-related resistance than others, we believe that economic concerns do play a limited role. In fact, in-house lawyers complained to us about foot-dragging regarding mediation use by outside lawyers, convinced that economic concerns dominated their agenda.<sup>95</sup> One company actually took the decision about whether to employ mediation away from outside counsel for that reason.<sup>96</sup> Outside our study, some corporations give a bonus to outside counsel achieving early settlement as a means to reverse the economic incentives.<sup>97</sup> Also, the general counsel in

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<sup>90</sup> See Stipanowich, *supra* note 5, at 123-124.

<sup>91</sup> See THOMAS E. CARBONNEAU, *ALTERNATIVE DISPUTE RESOLUTION: MELTING THE LANCES AND DISMOUNTING THE STEEDS* 174 (1989); Riskin, *supra* note 38, at 43-49. See generally Marguerite Millhauser, *The Unspoken Resistance to Alternative Dispute Resolution*, 3 *NEGOTIATION J.* 29 (1987).

<sup>92</sup> See Corporate Study, *supra* note 46.

<sup>93</sup> See Ohio Attorney Survey, *supra* note 6, author's retabulation (Feb. 13, 1998) (on file with authors).

<sup>94</sup> See *supra* text accompanying notes 78-79.

<sup>95</sup> See Corporate Study, *supra* note 46.

<sup>96</sup> See *id.*

<sup>97</sup> See CRONIN-HARRIS, *supra* note 67, at 39-41; MAINSTREAMING: INSTITUTIONALIZING CORPORATE ADR, *supra* note 59, at D44 (Catherine Cronin-Harris



## DIRECT AND EARLY NEGOTIATIONS

the company using mediation most often told us that he wanted to increase economic incentives for business principals to demand mediation from lawyers, so he convinced the company to charge legal fees to the department making decisions about litigation.<sup>98</sup> In sum, the picture we present gives little credence to the view that lawyers cannot switch from hired guns to hired problem-solvers, but suggests that economic disincentives may be counted among many reasons for lawyer reluctance to use mediation.

The studies suggest that expanded use of mediation by lawyers and corporations does not typically occur merely because the lawyers are favorably disposed toward the idea of mediation, nor because the lawyers have been asked by one in authority to make greater use of mediation. Rather, because mediation, especially mediation early enough in the case to make a difference, runs head on into conventional wisdom about effective representation, attorneys are reluctant to make use of it. In the corporate context, general counsel can deal directly with these fears. Beyond the corporate context, one productive strategy to change the lawyer's conventional wisdom and promote further references to mediation by that lawyer is to create situations in which both lawyers and clients participate in mediation sessions held early in the dispute. Another strategy is to support court programs that make it preferable within the culture of the local legal community to refer clients to mediation.

Although legal policy favors changes in the disputing climate, it is difficult to assess what kinds of provisions in statutes or rules would be most effective in bringing about the change. In the next part, this Article examines sets of possible strategies to do so through the law and assess how and why some will work better than others.

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ed., 1994) (describing General Mills's use of a declining bonus system whereby amount of bonus decreases as litigation approaches, and other companies' use of fixed amount or percentage bonus systems based on the estimated savings to the company advised in settlement).

<sup>98</sup> See Corporate Study, *supra* note 46.

### III. THE EFFECTS OF LAW ON EXPANSION OR REDUCTION IN THE USE OF MEDIATION

#### A. *Compulsory Participation in Mediation*

##### 1. *Compulsory Participation and Greater Use*

Compulsory participation increases the use of mediation. Research indicates substantially higher participation in mandatory than in voluntary mediation programs.<sup>99</sup> Also the corporate and Ohio research reported in the last section suggests that the expanded experience which occurs because of mandatory mediation programs indirectly increases referrals by lawyers to mediation.<sup>100</sup> Lawyers who attend these sessions are more likely to refer clients to mediation than those who have not attended.<sup>101</sup> Also, lawyers practicing in the same county as the court program are less hesitant to refer clients to mediation.<sup>102</sup> If scheduled early and inclusive of both lawyers and clients, the mandatory mediation may also have spillover effects on the timing and inclusion of clients in negotiation occurring without a mediator.

Despite substantial debate in the commentary about mandatory mediation,<sup>103</sup> most jurisdictions authorize compulsory participation in

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<sup>99</sup> See Jessica Pearson, *An Evaluation of Alternatives to Court Adjudication*, 7 JUST. SYS. J. 420, 426-429 (1982).

<sup>100</sup> See *supra* text accompanying notes 61-90.

<sup>101</sup> See *supra* text accompanying notes 61-90.

<sup>102</sup> See *supra* text accompanying notes 61-90.

<sup>103</sup> See generally Frank E.A. Sander et al., *Judicial (Mis)use of ADR? A Debate*, 27 U. TOL. L. REV. 885 (1996) (consisting of a debate among Frank E.A. Sander, H. William Allen and Deborah Hensler). For commentary opposing or questioning mandatory mediation, see Andree G. Gagnon, *Ending Mandatory Divorce Mediation for Battered Women*, 15 HARV. WOMEN'S L.J. 272, 273-274 (1992); Dwight Golann, *Making Alternative Dispute Resolution Mandatory: The Constitutional Issues*, 68 OR. L. REV. 487, 496 (1989); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1600-1607 (1991); Richard Ingleby, *Court Sponsored Mediation: The Case Against Mandatory Participation*, 56 MOD. L. REV. 441, 443 (1993); Lucy V. Katz, *Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster or Two Sides of the Coin*, 1993 J. DISP. RESOL. 1, 3; Note, *Mandatory Mediation and Summary Jury Trial: Guidelines for Ensuring Fair and Effective Processes*, 103 HARV. L. REV. 1086, 1086 (1990). For neutral or favorable commentary, see ROGERS & MCEWEN, *supra* note 5, §§ 7:01-7:04; Christy L. Hendricks, *The Trend Toward Mandatory Mediation in Custody and Visitation Disputes*

mediation for some types of cases,<sup>104</sup> and organizations in the field endorse mandatory mediation if appropriate safeguards are in place.<sup>105</sup> Statutes and rules implementing mandatory mediation employ a variety of formats.<sup>106</sup> These laws sometimes authorize the courts or agencies to require participation in particular types of cases<sup>107</sup> or to require the participation of all parties if requested by one party.<sup>108</sup> Other statutes mandate participation in mediation for all cases of a particular type, such as contested domestic cases involving minor children,<sup>109</sup> or make participation in mediation a prerequisite to filing an action, such as all farm mortgage cases in which mediation is not waived by the farmer<sup>110</sup> or voter registration litigation.<sup>111</sup>

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*of Minor Children: An Overview*, 32 J. FAM. L. 491, 493-496 (1993-94); Daniel A. Noonan & Judith M. Bostetter, *Alternative Dispute Resolution in Wisconsin: A Court Referral System*, 78 MARQ. L. REV. 609, 609-611 (1995); Michael E. Weinzierl, *Wisconsin's New Court-Ordered ADR Law: Why it is Needed and its Potential for Success*, 78 MARQ. L. REV. 583, 583-584 (1995).

<sup>104</sup> See ROGERS & MCEWEN, *supra* note 5, at Appendix B.

<sup>105</sup> See AMERICAN BAR ASSOCIATION RESOLUTION 112 (1997) (demonstrating that the ABA supports court mediation and apparently does not oppose mandatory mediation because the resolution specifically excludes mandatory non-binding arbitration but does not exclude mandatory mediation); MANDATED PARTICIPATION AND SETTLEMENT COERCION: DISPUTE RESOLUTION AS IT RELATES TO THE COURTS 1 (Society for Professionals in Dispute Resolution 1991); NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS 5-1 to 5-5 (1990).

<sup>106</sup> See ROGERS & MCEWEN, *supra* note 5, § 7:02.

<sup>107</sup> See, e.g., 29 U.S.C. § 173 (1994) (providing that all parties must participate when Federal Mediation and Conciliation Services decides to hold mediation of collective bargaining disputes); ALASKA STAT. § 25.24.060 (1996); CAL. FAM. CODE § 3170 (West 1996); IOWA CODE § 598.41 (1995); OR. REV. STAT. § 107.755 (1995); DEL. FAM. CT. R. 201 (1996).

<sup>108</sup> See, e.g., HAW. REV. STAT. § 205-5.1 (1985) (providing that, if one party requests mediation, all other parties to the geothermal activities dispute may be required to participate); MINN. STAT. § 120.1701 (1993 & Supp. 1998) (requiring all parties to a special education dispute to participate in mediation if requested by one of the parents); MO. REV. STAT. § 452.403 (1996) (stating that the court may require participation by parents in child custody and visitation disputes if grandparent requests mediation).

<sup>109</sup> See, e.g., ME. REV. STAT. ANN. tit. 19-A, § 251 (West 1998).

<sup>110</sup> See, e.g., IOWA CODE § 654A.6 (1996); see also N.C. GEN. STAT. § 7A-38.3(c) (1997) (mandating mediation for farm-nuisance litigation).

<sup>111</sup> See, e.g., FLA. STAT. ANN. § 97.023(3) (West 1990); HAW. REV. STAT. § 5080-18 (1985) (mandating mediation for certain real estate actions); WASH. REV. CODE § 59.20.080(2) (1990 & Supp. 1998) (mandating mediation for mobile home evictions).

In other instances, the parties are not compelled to participate in mediation, but suffer negative consequences if they do not, such as loss of the right to recover attorney's fees,<sup>112</sup> professional sanctions<sup>113</sup> and decertification for a business.<sup>114</sup> Yet another approach is to require the parties to agree to a dispute resolution process that they must use during the court process<sup>115</sup> or prior to returning to the court or agency.<sup>116</sup> Some statutes and rules stop short of requiring participation and instead require attendance at a conference to discuss the possibility of using mediation or another dispute resolution process.<sup>117</sup>

It is too early to assess whether any particular approach to compulsory participation is superior to others from the standpoint of enhancing participation in mediation and having a positive spillover effect on referrals to mediation or effective negotiation. Regardless of the mandatory participation mechanism, the participants seem as satisfied and settle about the same proportion of cases. In fact, settlement rates seem to resemble those of voluntary programs.<sup>118</sup>

## 2. Exemptions from Compulsory Participation

In order to preserve fairness and access to adjudication, laws authorizing compulsory participation in mediation exempt a number of

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<sup>112</sup> See, e.g., FLA. STAT. ANN. §§ 723.037–723.038 (West 1988).

<sup>113</sup> See, e.g., CAL. BUS. & PROF. CODE § 6086.14 (West Supp. 1998).

<sup>114</sup> See, e.g., FLA. STAT. ANN. § 559.927 (West 1997).

<sup>115</sup> See, e.g., N.H. SUPER. CT. R. 170 (Michie 1997).

<sup>116</sup> See, e.g., CAL. PUB. RES. CODE § 44204(d) (West 1996) (requiring dispute resolution clause in agreements between Native American tribes and agencies on environmental disputes); FLA. STAT. ANN. § 287.073(5)(b) (West 1990) (requiring dispute resolution clause in information technology resources contracts); IND. CODE § 13–25–5–8 (Supp. 1997) (requiring dispute resolution clause in environmental work plans); KAN. STAT. ANN. § 39–1806 (1995) (requiring mediation clause in disability provider contracts); N.J. STAT. ANN. § 2A:44A–21(b)(3) (West Supp. 1997) (requiring mediation clause for housing liens); OR. REV. STAT. § 90.610 (1995) (requiring dispute resolution clause in specified rental agreements); WASH. REV. CODE § 26.09.184(3) (1997) (requiring dispute resolution clause in custody/visitation agreement between divorcing parents).

<sup>117</sup> See, e.g., MINN. GEN. R. OF PRAC. § 114.07 (West 1998).

<sup>118</sup> See NATIONAL SYMPOSIUM, *supra* note 4, at 74–75. One exception may warrant further inquiry—the Ohio surveys indicate higher settlement rates when at least one party requested the mediation. See Settlement Week Survey, *supra* note 48, at 17.

cases.<sup>119</sup> Mandatory domestic mediation statutes often exempt cases involving domestic violence, and cases involving a parent who suffers from substance abuse or mental illness, a severe bargaining disadvantage, or undue hardship in attending the session.<sup>120</sup> Outside the domestic context, parties are exempted when attendance would unduly burden one party.<sup>121</sup> Occasionally, parties can simply opt out of mandatory mediation without reason.<sup>122</sup>

The relative success of various approaches to exempting parties from mandatory participation, in terms of the effects on enhancing participation, is difficult to assess. There are few studies and little reported case law on these exemptions.<sup>123</sup> Their effects on the fairness of the process or access to further litigation are subjects of other articles in this symposium.

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<sup>119</sup> See generally ROGERS & MCEWEN, *supra* note 5, § 7:02 (listing exceptions).

<sup>120</sup> See ARIZ. REV. STAT. ANN. § 25-381.23 (West 1991) (excluding cases where there is undue hardship); COLO. REV. STAT. § 13-22-311(1) (1997) (excluding cases with domestic abuse); FLA. STAT. ANN. § 44.102(2)(b) (West Supp. 1998) (excluding case if significant history of violence would compromise mediation); LA. REV. STAT. ANN. § 363 (West Supp. 1998) (excluding case if court finds that family violence exists); MINN. STAT. § 518.619(2) (1990) (excluding cases with probable cause of domestic abuse); NEV. REV. STAT. ANN. § 3.500(2)(b) (Michie Supp. 1993) (allowing exclusion of case with a showing of child abuse or domestic violence); N.C. GEN. STAT. § 50-13.1(c) (Supp. 1995) (excluding cases with allegations of party or child abuse, substance abuse, mental health and undue hardship); N.D. CENT. CODE § 14-09.1-02 (1997) (excluding case if there is an issue of abuse); OHIO REV. CODE ANN. § 3109.052(A) (Anderson 1996) (providing that conviction or determination that parent perpetrated abusive act is a factor in deciding whether mediation is appropriate); OR. REV. STAT. § 107.179(3) (1995) (excluding cases where there is emotional distress); UTAH CODE ANN. § 30-3-22 (1995) (excluding case if mediation participation would cause undue hardship, substance abuse, mental illness or threaten health or safety); WIS. STAT. ANN. § 767.11(8)(b) (West 1993) (excluding cases where there is undue hardship); MD. R. SPEC. PROC. S73A(b)(2) (1990) (excluding case if there is genuine issue of physical or sexual abuse of party or child); N.J. R. GEN. APPL. 1.40-5 (excluding cases if there is in effect a preliminary or final order regarding domestic violence pursuant to state statute).

<sup>121</sup> See COLO. REV. STAT. § 13-22-311(1) (1997).

<sup>122</sup> See OR. REV. STAT. § 36.185 (Supp. 1996).

<sup>123</sup> See *Bauer v. Hardy*, 651 So. 2d 748, 748 (Fla. Dist. Ct. App. 1995) (holding party who had petitioned for bankruptcy and was not able to pay mediator's fee should be exempted from payment); McEwen et al., *supra* note 5, at 1335-1340 (regarding exclusions for domestic cases).

### 3. *Compulsory Attendance by Parties*

Another subject of varying approaches has been whether both the parties and attorneys are required to, encouraged to or allowed to attend mediation sessions.<sup>124</sup> When a statute does not authorize a court to require attendance of parties, the courts have struggled with whether Federal Rule of Civil Procedure 16 allows the court to compel attendance by represented parties. The language of Rule 16 is unclear on this point, and the courts weigh competing policy considerations.<sup>125</sup> On the one hand, the courts note that party attendance seems to improve the chances of settlement.<sup>126</sup> On the other hand, courts express concern that trial judges require attendance when it would be so burdensome for a party as to force settlement.<sup>127</sup> In a Seventh Circuit case, for example, dissenters note that one court had required a cabinet member-designee to attend a settlement conference on the day of his Senate confirmation hearings.<sup>128</sup> In another example of burdensome attendance requirements, a court required attendance by the board of trustees of an insurance company in an insurance case.<sup>129</sup>

There seems to be strong support for including provisions that require attendance at mediation sessions by parties while exempting those cases when attendance would be unduly burdensome. Absent statutory authorization, some courts will not include the parties.

Setting aside these broader policy reasons for client inclusion, the corporate and Ohio studies, discussed above, suggest that mediation with party attendance helps to change the lawyers' conventional wisdom that clients should be excluded from the give and take of negotiations and serves the public policy of encouraging more direct involvement of parties in the

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<sup>124</sup> See ROGERS & MCEWEN, *supra* note 5, § 6:07 (listing approaches).

<sup>125</sup> Rule 16(a) authorizes courts to require appearances at conferences by "the attorneys for the parties and any unrepresented parties." FED. R. CIV. P. 16(a). Numerous courts have weighed these competing policy considerations. See *G. Heileman Brewing v. Joseph Oat Corp.*, 871 F.2d 648, 650 (7th Cir. 1989); *Dvorak v. Shibata*, 123 F.R.D. 608, 609-610 (D. Neb. 1988); *In re Air Crash at Stapleton Int'l Airport, Denver*, 720 F. Supp. 1433, 1438-1439 (D. Colo. 1988).

<sup>126</sup> See, e.g., *G. Heileman Brewing Co.*, 871 F.2d at 652-653; *Dvorak*, 123 F.R.D at 609-610; *In re Air Crash*, 720 F. Supp. at 1438-1439.

<sup>127</sup> See, e.g., *In re Stone*, 986 F.2d 898, 905 (5th Cir. 1993).

<sup>128</sup> See *G. Heileman Brewing Co.*, 871 F.2d at 657 (Posner, J., dissenting).

<sup>129</sup> See *Physicians Protective Trust Fund v. Overman*, 636 So. 2d 827, 829 (Fla. Dist. Ct. App. 1994).

resolution of their conflicts.<sup>130</sup> Thus, requiring participation by parties when their attendance would not be unduly burdensome has been deemed better for settlement reasons, but it is also better as a way to create the spillover effect of encouraging lawyers to refer clients to mediation and to include clients in negotiations without a mediator.<sup>131</sup>

#### 4. *Compulsory Participation by Lawyers*

Legislators have been ambivalent about inclusion of lawyers in mediation, especially for family and interpersonal disputes. A Missouri statute prohibits attorney participation at special education mediation sessions.<sup>132</sup> Other statutes permit the mediator to exclude or limit participation of lawyers.<sup>133</sup> In some jurisdictions, the programs limit mediation to issues that normally would not be handled by lawyers so that lawyer attendance at domestic mediation sessions is the exception rather than the rule.<sup>134</sup>

The Ohio and corporate research supports encouragement of lawyer participation in mediation as a means to influence lawyers to recommend mediation to their clients and to change their approach to negotiations at

<sup>130</sup> See *supra* Part II.

<sup>131</sup> Party participation is desirable for a variety of reasons beyond the scope of this article. For a discussion of party participation in mediation, see generally Leonard L. Riskin, *The Represented Client in a Settlement Conference: The Lessons of G. Heileman Brewing Co. v. Joseph Oat Corp.*, 69 WASH. U. L.Q. 1059 (1991). Professor Riskin argues that, although there are competing policy concerns regarding party participation, the weight is on the side of including parties. See *id.* at 1114–1116. The National Standards for Court-Connected Mediation Programs took this view as well. See NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS, *supra* note 105, at 2–5 (Center for Dispute Settlement 1992).

<sup>132</sup> See MO. REV. STAT. § 162.959.9 (Supp. 1998).

<sup>133</sup> See, e.g., CAL. FAM. CODE § 3182 (West 1994) (permitting exclusion of lawyers); KAN. STAT. ANN. § 23–603(a)(6) (1995) (permitting exclusion of lawyers); FLA. STAT. ANN. § 44.1011(d) (West Supp. 1998) (permitting lawyers to speak only to clients during session); WIS. STAT. ANN. § 767.11(a) (1993) (permitting exclusion of lawyers); ARIZ. SUPER. CT. R. LOCAL PRAC. (Maricopa County) (West 1996) (permitting exclusion of lawyers after beginning of session).

<sup>134</sup> See McEwen et al., *supra* note 5, at 1331 n.72 (reporting that only 14% of domestic court mediation programs, most of which limit mediation to custody and visitation rather than economic issues, report that lawyers attend most mediation sessions).

other points.<sup>135</sup> In other words, enhancement of mediation use and encouragement of direct and early negotiation weigh in favor of encouraging lawyer attendance at mandatory mediation sessions.

Aside from the desire to expand use of mediation and improve negotiations, lawyer participation should be encouraged to improve the fairness of the mediation. Research on the balance between the need to preserve fairness and the fear that lawyers will disrupt the effectiveness of mediation sessions indicates that the balance weighs in favor of lawyer inclusion.<sup>136</sup> Both the Society for Professionals in Dispute Resolution and the Standards for Court-Connected Mediation Programs weighed these considerations and endorsed encouragement of lawyer attendance for fairness reasons. They noted: "Lawyers may act as a crucial check against uninformed and pressured settlement, particularly when they are knowledgeable about the dispute resolution process. It is the parties in consultation with their lawyers—not public authorities—who are in the best position to decide when the lawyers' presence is indicated."<sup>137</sup>

In other words, if lawyers attend mediation, they protect against unfairness and, at the same time, the process makes them more effective at recommending mediation and in their negotiations.

In sum, the effort to increase use of mediation and encourage direct and early negotiation is aided by authorization to compel participation in mediation. A model statute should permit mandatory mediation as long as safeguards are in place to meet goals discussed in other articles in this symposium. The statute's purpose clause should also encourage early scheduling of mediation in an effort to change lawyers' conventional wisdom to postpone earnest negotiations until later in the case as well as to save parties' costs. To increase direct negotiation outside of mediation, explicit authorization for party attendance when not unduly burdensome or unfair should be a part of the mandatory mediation provisions. In addition, the statute should make clear that the parties may bring their lawyers to participate at the mediation session, as this provision serves to promote its educational function for attorneys as well as fairness of the process.

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<sup>135</sup> See *supra* text accompanying notes 72–76.

<sup>136</sup> See McEwen et al., *supra* note 5, at 1394 (summarizing effects of lawyer attendance on fairness and party's participation and results).

<sup>137</sup> MANDATED PARTICIPATION AND SETTLEMENT COERCION, *supra* note 105, at 18; National Standards for Court-Connected Mediation Programs 10–3 (Center for Dispute Settlement) (on file with authors).



## B. Mediator Qualification/Standards and the Use of Mediation

Some commentators have contended that mediation use is tied to the quality and cost of mediators.<sup>138</sup> In other words, the more available high quality and low cost mediators are, the more likely that they will be used. This truism provides little guidance to drafters of a uniform or model statute. The problem is that what might be done through law to encourage quality, especially through mediator qualifications and standards,<sup>139</sup> may well increase cost. Also, what helps quality in one way may hurt it in another. For example, extensive mediator qualifications may improve the mediation program's reputation but interfere with program administrators' efforts to create a diverse pool of mediators or to provide access to mediation in predominantly rural areas.<sup>140</sup>

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<sup>138</sup> See Bobby Marzine Harges, *Mediator Qualifications: The Trend Toward Professionalism*, 1997 BYU L. REV. 687, 701.

<sup>139</sup> For commentary on mediation qualifications and standards, see generally ALBIE DAVIS, *HOW TO ENSURE HIGH-QUALITY MEDIATION SERVICES: THE ISSUE OF CREDENTIALING IN COMMUNITY MEDIATION: A HANDBOOK FOR PRACTITIONERS AND RESEARCHERS* 203 (1991); KIMBERLEE K. KOVACH, *MEDIATION: PRINCIPLES AND PRACTICE* 207-209 (1994); ROGERS & MCEWEN, *supra* note 5, § 11.02; W. Lee Dobbins, *The Debate Over Mediation Qualifications: Can They Satisfy the Growing Need to Measure Competence Without Barring Entry into the Market?*, 7 U. FLA. J.L. & PUB. POL'Y 95 (1995) (addressing the debate concerning mediator qualifications, consumer choice and the free market); Deborah B. Gentry, *The Certification Movement: Past, Present, and Future*, 11 MEDIATION Q. 285 (1994); Edward Hartfield, *Qualifications and Training Standards for Mediators of Environmental and Public Policy Disputes*, 12 SETON HALL LEGIS. J. 109 (1988); Margaret Shaw, *Mediator Qualifications: Report of a Symposium on Critical Issues in Alternative Dispute Resolution*, 12 SETON HALL LEGIS. J. 125 (1988) (highlighting debate concerning need for guidelines); Carole Silver, *Models of Quality for Third Parties in Alternative Dispute Resolution*, 12 OHIO ST. J. ON DISP. RESOL. 37 (1996) (analyzing six models of "third party" practice and suggesting regulatory action); Ann Taylor, *The Four Foundations of Family Mediation: Implications for Training and Certification*, 12 MEDIATION Q. 77 (1994) (discussing the advantages and disadvantages of lawyers and mental health professionals as mediators); Symposium, *Certification of Mediators in California*, 30 U.S.F. L. REV. 609 (1996); Symposium, *Who Really Is a Mediator?: A Special Section on the Interim Guidelines*, 9 NEGOTIATION J. 293 (1993); Nichol M. Schoenfield, Note, *Turf Battles and Professional Biases: An Analysis of Mediator Qualifications in Child Custody Disputes*, 11 OHIO ST. J. ON DISP. RESOL. 469 (1996).

<sup>140</sup> For a discussion of the impact of mediator qualifications of the process, see ROBERT M. JONES ET AL., *ENSURING COMPETENCE AND QUALITY IN DISPUTE RESOLUTION PRACTICE* 18 (SPIDR Commission on Qualifications 1995) [hereinafter

The composition of the mediator pool affects mediation use in yet another way. Lawyers who are trained as mediators or serve as mediators are more likely to recommend mediation to their clients, according to the Ohio attorney surveys.<sup>141</sup> Therefore, mediator qualifications such as continuing education and extensive training requirements may discourage part-time lawyer-mediators,<sup>142</sup> and thereby also inhibit growth in the use of mediation.

Given the possible cost of mediator qualifications, in terms of discouraging mediation, it is important to be certain that the qualifications are worth the price in terms of improving quality. Research casts doubt on an approach to mediator qualifications that merely synthesizes the approaches taken by statute and rule, usually a combination of educational degrees and hours of mediation training.<sup>143</sup> The Ohio mediation exit surveys demonstrated no dramatic differences in settlement rates, party satisfaction, party participation or party or attorney perceptions of fairness among mediators by hours of mediator training or expertise in the subject matter of the dispute—two common mediator qualifications.<sup>144</sup> The lawyers in our corporate survey rarely searched for mediators in terms of these statutory qualifications. Instead, they looked for qualities of experience and styles of mediation not regulated by most qualifications standards.<sup>145</sup> Those lawyers experienced in mediation spoke more often of timing and getting the mediation going than about having mediators who met specific qualifications. They preferred mediators who had mediated often but they frequently let the other side select the mediator.<sup>146</sup> In one in-house

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ENSURING COMPETENCE]; QUALIFYING NEUTRALS: THE BASIC PRINCIPLES 9 (SPIDR Commission on Qualifications 1989).

<sup>141</sup> See Ohio Attorney Survey, *supra* note 6, at 14–15.

<sup>142</sup> For a listing of statutes requiring educational degrees and training, see McEwen et al., *supra* note 5, at 1343 nn.149–150; Harges, *supra* note 138, at 695–700. For proposals to use skills testing instead, see TEST DESIGN PROJECT, INTERIM GUIDELINES FOR SELECTING MEDIATORS 1–2 (1993); Symposium, *Who Really Is a Mediator? A Special Section on the Interim Guidelines*, 9 NEGOTIATION J. 293, 295–353 (1993).

<sup>143</sup> See QUALIFYING NEUTRALS, *supra* note 140, at 9. For charts of statutory qualifications, see Harges, *supra* note 138, at 695; McEwen et al., *supra* note 5, at 1397.

<sup>144</sup> See *supra* text accompanying note 130.

<sup>145</sup> See Corporate Study, *supra* note 46.

<sup>146</sup> See *id.*; see also CRONIN-HARRIS, *supra* note 67, at 42–43 (discussing the willingness to “allow the opposing party to . . . recommend neutrals from which the

memorandum, lawyers were advised to defer to the other side's choice of mediators, even if the person nominated lacked experience or the desired style:

Lawyers will often want to know if the company has used the neutral before, the person's level of experience, who his or her references are, etc. Also, being naturally suspicious types, a lawyer will often be cool to the idea of voluntary ADR altogether unless the neutral is someone instantly recognizable, such as a former judge. This bias has on occasion led us to agree to the retention of a former Judge or publicly-recognized figure, when we felt better skilled neutrals were available elsewhere. . . . Again, the first requirement is to create the environment for the success of the mediation; if this requires selection of a publicly-recognized neutral, such a selection is probably the right step.<sup>147</sup>

In the Ohio mediation exit survey, lawyers were similarly uncritical of the mediators' competence,<sup>148</sup> though 65% of the mediators had 6 hours of mediation training or less, 30% had mediated 3 cases or fewer and 58% practiced in a substantive area unrelated to the case.<sup>149</sup> Similar findings were reported in a Maine study of divorce lawyers; Maine lawyers said that they could take over and have an effective negotiation session even with a weak mediator.<sup>150</sup> This evidence does not support a view that highly trained and experienced mediators are a major factor in increasing mediation use.

Skepticism about existing statutory qualifications seems to be a broader conclusion of those in the field. In fact, the Society of Professionals in Dispute Resolution has warned legislators not to transform typical program qualifications into licensure requirements, stating that "[t]he state of knowledge is nascent concerning what qualifications practitioners require to provide effective dispute resolution services."<sup>151</sup>

Given the costs and the reason to question the benefits, drafters should proceed cautiously in imposing mediator qualifications. The same caution may be appropriate for mediator standards, discussed in another article in this symposium, because they may promote defensive practices and add to

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ultimate neutral will be selected").

<sup>147</sup> Corporate Study, *supra* note 46.

<sup>148</sup> See Settlement Week Survey, *supra* note 48, at 12.

<sup>149</sup> See *id.* at 6-7.

<sup>150</sup> See McEwen et al., *supra* note 5, at 1357-1358.

<sup>151</sup> ENSURING COMPETENCE, *supra* note 140, at 18.

the expense of mediation.<sup>152</sup> Drafters should look for strong evidence of effectiveness of both mediator qualifications and standards because they may inhibit the use of mediation.

### *C. Other Strategies for Increasing Mediation Use Through Statutory Provisions*

A number of other provisions in existing laws might appear to enhance the use of mediation. These include provisions to enforce mediation clauses, to provide stronger sanctions for violation of mediated agreements than for violation of other settlement agreements, to require attorneys to discuss mediation with clients and to authorize creation of mediation programs for a variety of types of disputes. We remain unconvinced that these types of provisions will substantially increase the use of mediation.

#### *1. Enforcement of Mediation Clauses*

About a tenth of attorneys who prepare contracts in their practices often advise clients to include a mediation clause, according to the Ohio survey research.<sup>153</sup> Mediation clauses may increase the chances that people will use mediation once a dispute arises,<sup>154</sup> and new research supports the view that settlement is as likely in mediation pursuant to a mediation clause as in mediation agreed to after the dispute arises.<sup>155</sup> A few statutes recognize the importance of enforcement of mediation clauses by providing for their enforcement.<sup>156</sup>

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<sup>152</sup> See ROGERS & MCEWEN, *supra* note 5, § 11:07 (warning about costs of regulating mediators); John D. Feerick, *Toward Uniform Standards of Conduct for Mediators*, 38 TEX. L. REV. 455, 455-460 (1997) (discussing the Model Standards of Conduct for Mediators, adopted by the American Bar Association Section on Dispute Resolution, the American Arbitration Association and (in principle) the Society of Professionals in Dispute Resolution in 1994); Jamie Henikoff & Michael Moffitt, *Remodeling the Model Standards of Conduct for Mediators*, 2 HARV. NEGOTIATION L. REV. 87, 87-93 (1997) (advocating more stringent standards than contained in the Model Standards of Conduct for Mediators).

<sup>153</sup> See Ohio Attorney Survey, *supra* note 6, at 8.

<sup>154</sup> See J. Michael Keating, Jr., *Getting Reluctant Parties to Mediate: A Guide to Advocates*, 13 ALTERNATIVES TO HIGH COST LITIG. 9, 11 (1995).

<sup>155</sup> See generally Brett et al., *supra* note 4.

<sup>156</sup> See, e.g., HAW. REV. STAT. § 508D-18 (1997); KY. REV. STAT. ANN.

## DIRECT AND EARLY NEGOTIATIONS

Statutory provision for the enforcement of mediation clauses may not enhance the use of or compliance with them, however. Even without statutory authorization, the courts have enforced mediation clauses as a matter of contract law<sup>157</sup> or by analogy to the Federal Arbitration Act.<sup>158</sup> Although courts that refuse to apply the Federal Arbitration Act to mediation will not give summary enforcement to the mediation clause, those courts will dismiss litigation if a party fails to comply.<sup>159</sup> Given the inexpensive character of most mediation, the parties are likely to comply if they will be precluded from litigating until they comply.<sup>160</sup> If so, then existing contract law doctrines provide sufficiently for their enforcement; statutory provision for enforcement of mediation clauses may be unnecessary except to codify the law, in the hope that this would encourage more use of mediation clauses.<sup>161</sup>

A more fruitful avenue, in terms of expanding use, may be in requiring mediation clauses in settlement agreements. Some states require dispute resolution clauses in domestic court custody and visitation settlements,<sup>162</sup> rental agreements,<sup>163</sup> environmental agreements,<sup>164</sup> disability provider

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§ 342.277 (Michie 1997); S.D. CODIFIED LAWS § 77-4A-2 (Michie Supp. 1997).

<sup>157</sup> See, e.g., *DeValk Lincoln Mercury, Inc. v. Ford Motor Co.*, 811 F.2d 326, 335-337 (7th Cir. 1987); *Haertl Wolff Parker, Inc. v. Howard S. Wright Constr. Co.*, 1989 WL 151765, at \*4 (D. Or. Dec. 4, 1989). But see *Design Benefit Plans, Inc. v. John Enright*, 940 F. Supp. 200, 204-206 (N.D. Ill. 1996) (enforcing combined mediation and arbitration clause); *Regan v. Regan*, 660 So. 2d 1166, 1167-1168 (Fla. Dist. Ct. App. 1995) (refusing to compel father to pay attorney's fees of mother for failure to abide by contract provision requiring mediation).

<sup>158</sup> See, e.g., *AMF, Inc. v. Brunswick Corp.*, 632 F. Supp. 456, 461 (E.D.N.Y. 1985) (regarding process through which the parties received a nonbinding evaluation); *Annapolis Prof'l Firefighters Local 1926, IAFF, AFL-CIO v. City of Annapolis*, 642 A.2d 889, 894 (Md. Ct. App. 1993) (appearing in dicta). But see *Harrison v. Nissan Motor Corp. in U.S.A.*, 111 F.3d 343, 350-352 (3d Cir. 1997) (declining to apply Federal Arbitration Act to clause for informal dispute resolution process for automobile purchasers).

<sup>159</sup> See *supra* notes 157-158.

<sup>160</sup> See *ROGERS & MCEWEN*, *supra* note 5, § 8:01.

<sup>161</sup> See Merton C. Bernstein, *The Desirability of a Statute for the Enforcement of Mediated Agreements*, 2 OHIO ST. J. ON DISP. RESOL. 117, 117-118 (1986) (arguing that lawyers will be less reluctant to use mediation if codification makes the related law clear and gives respectability to it).

<sup>162</sup> See ARIZ. REV. STAT. ANN. § 25-332 (West 1997); WASH. REV. CODE § 26.09.184 (1997).

<sup>163</sup> See OR. REV. STAT. § 90.610 (1995).

contracts,<sup>165</sup> information technology agreements<sup>166</sup> and housing liens.<sup>167</sup> Analogizing to research on mandatory mediation, one could argue that required mediation clauses would expand mediation use significantly.

## 2. Sanctions for Violation of Mediated Agreements

People may be hesitant to participate in mediation if the results are not enforceable as a legal or practical matter.<sup>168</sup> Several statutes have explicitly provided for the enforcement of mediated agreements, apparently to overcome this hesitancy.<sup>169</sup> Hesitancy grounded in fears regarding enforcement appears to be baseless, however. Mediated settlements, in most instances, are on the same footing for legal enforcement as other settlements.<sup>170</sup> Most parties are content enough with the enforceability of these results to settle.<sup>171</sup> Moreover, the practical reality is that the parties are as likely—and sometimes more likely—to abide voluntarily by mediated settlements as by other settlements or to comply with judgments after

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<sup>164</sup> See CAL. PUB. RES. CODE § 44204 (West 1997); IND. CODE §§ 13-7-8.9-13, 13-25-58 (1997).

<sup>165</sup> See KAN. STAT. ANN. § 39-1806 (1995).

<sup>166</sup> See FLA. STAT. § 287.073(5)(b) (1997).

<sup>167</sup> See N.J. STAT. ANN. § 2A:44A-21(b)(3) (West 1997).

<sup>168</sup> See Fiss, *supra* note 8, at 1074-1075 (suggesting that settlement provides less of a basis for court enforcement than a litigated judgment). For commentary on the need for a statute regarding enforcement, see Bernstein, *supra* note 161, at 117 (arguing for a statute); Robert P. Burns, *The Enforceability of Mediated Agreements: An Essay on Legitimation and Process Integrity*, 2 OHIO ST. J. ON DISP. RESOL. 93, 93-94 (1986) (arguing against a statute); Cathleen Cover Payne, *Enforceability of Mediated Agreements*, 1 OHIO ST. J. ON DISP. RESOL. 385, 404-405 (1986) (arguing that mediated agreements should be treated no differently than other settlements).

<sup>169</sup> See, e.g., GA. CODE ANN. § 45-19-32 (1997); HAW. REV. STAT. § 378-5(i) (1997); IND. CODE § 22-9-1-6(p) (1997); KY. REV. STAT. ANN. § 344.610 (Michie 1997).

<sup>170</sup> See generally ROGERS & MCEWEN, *supra* note 5, § 4:13. See also Sheng v. Starkey Lab., 117 F.3d 1081, 1083-1084 (8th Cir. 1997) (noting validity of mediated agreement governed by contract law); Martin v. Black, 909 S.W.2d 192, 195-196 (Tex. App. 1995 writ denied) (noting validity of mediated agreement governed by contract law).

<sup>171</sup> See Marc Galanter & Mia Cahill, "Most Cases Settle": Judicial Promotion and Regulation of Settlement, 46 STAN. L. REV. 1339, 1340 (1994) (citing research indicating that two-thirds of all civil cases settle prior to trial); Gross & Syverud, *supra* note 15, at 1.

trial.<sup>172</sup>

A few problems have arisen regarding confidentiality and enforcement of oral settlements reached during mediation. Some courts have ruled that evidence of statements made during the mediation sessions are privileged and cannot be used to establish an oral agreement.<sup>173</sup>

A number of solutions to this problem are readily available, however. Some jurisdictions already require settlement agreements to be in writing.<sup>174</sup> Also, a recent California case indicates that the parties can reach an enforceable oral agreement by dictating into a recorder after the mediation has ended.<sup>175</sup> Another means to resolve the problem is to create an exception to the mediation privilege when the validity of the agreement is in issue.<sup>176</sup>

It might be argued that heightened enforcement provisions for mediated agreements would encourage greater use of mediation. Some statutes actually provide additional sanctions or summary enforcement for agreements reached during mediation.<sup>177</sup> Nonetheless, these provisions for added sanctions might be attractive to some parties but deter other parties from mediating. Further, the parties themselves can design stiffer penalties for violations through contract-related approaches such as liquidated damages, if the concern about insufficient sanctions for violations inhibits settlement.

In short, it is difficult to see how provisions for greater enforcement of mediated agreements would substantially increase the use of mediation or why codification of existing contract doctrines would lead to greater use.<sup>178</sup>

<sup>172</sup> See NATIONAL SYMPOSIUM, *supra* note 4, at 26, 72.

<sup>173</sup> See, e.g., *Ryan v. Garcia*, 33 Cal. Rptr. 2d 158, 159 (Cal. App. 4th 1994); *Hudson v. Hudson*, 600 So. 2d 7, 8-9 (Fla. App. 1992); *Cohen v. Cohen*, 609 So. 2d 785, 786 (Fla. App. 1992).

<sup>174</sup> See, e.g., FLA. R. CIV. P. 1.730(b); TEX. R. CIV. P. 11; see also *In re Allen*, 1996 WL 686895, at \*1 (Tex. App. Nov. 4, 1996); *Burckhard v. Del Monte Corp.*, 56 Cal. Rptr.2d 569, 571 (Cal. App. 4th 1996); *Murphy v. Padilla*, 49 Cal. Rptr.2d 722, 723 (Cal. App. 4th 1996).

<sup>175</sup> See *Regents of the Univ. of Cal. v. Sumner*, 50 Cal. Rptr.2d 200, 202 (Cal. App. 1996).

<sup>176</sup> See, e.g., N.D. CENT. CODE § 31-04-11 (1997); WYO. STAT. ANN. § 1-43-103 (Michie 1997).

<sup>177</sup> See, e.g., GA. CODE § 45-19-32 (1997); HAW. REV. STAT. § 378-5(i) (1997); IND. CODE § 22-9-1-6(p) (1997); KY. REV. STAT. ANN. § 344.610 (Michie 1997).

<sup>178</sup> But see *Bernstein*, *supra* note 161, at 117-119 (arguing for such a statute); *Burns*, *supra* note 168, at 115 (arguing against a statute on enforcement of mediated

### 3. Duties for Attorneys to Discuss Mediation with Clients

Professor Frank Sander has argued that lawyers ought to have a duty to advise clients about the use of dispute resolution options.<sup>179</sup> Sander argues, "[I]f . . . our mission is to help clients find the best way to handle their disputes . . . why shouldn't it be part of our explicit professional obligation to canvass those options with clients?"<sup>180</sup>

An initial question is whether an attorney duty, if advisable, should be in professional responsibility rules rather than in uniform or model provisions for a statute or court rule. Colorado has imposed such a duty through its code of ethics for attorneys,<sup>181</sup> and Michigan and Kansas through ethical provisions require lawyers to pass on the suggestion of use of alternative dispute resolution if raised by opposing counsel.<sup>182</sup> In Texas and Ohio, lawyers are exhorted to advise clients about dispute resolution options in lawyer creeds.<sup>183</sup>

Although the lawyer duties in Colorado, Texas, Michigan and Kansas were imposed through codes of ethics or interpretations of those codes, in two jurisdictions the provisions regarding lawyers' advice to clients were part of a court rule or statute. New Jersey lawyers are required by Supreme Court rule to inform clients of dispute resolution.<sup>184</sup> An Arkansas statute "encourages" lawyers to advise clients about dispute resolution processes.<sup>185</sup>

The more important question is not the placement of such duties in ethical provisions versus rules or statutes, but rather their advisability as a

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agreements).

<sup>179</sup> See Frank E.A. Sander & Michael Prigoff, *At Issue: Professional Responsibility: Should There Be a Duty to Advise of ADR Options?*, 74 A.B.A. J. 5050, 5050 (1990); see also Forest Mosten, *The Duty to Explore Settlement*, FAM. L. NEWSL. 2525, 2525 (State Bar of California Family Law Section 1990) (regarding malpractice liability for failure to encourage dispute resolution options).

<sup>180</sup> Sander & Prigoff, *supra* note 179, at 50.

<sup>181</sup> See *Colorado Adopts Ethics Rule*, 10 ALTERNATIVES TO HIGH COST LITIG. 70, 70 (1992).

<sup>182</sup> See Kansas Bar Association Ethics Advisory Committee, Opinion No. 94-1 (1994); State Bar of Michigan Standing Committee on Professional and Judicial Ethics, Opinion No. RI-255 (1996).

<sup>183</sup> See *Texas Supreme Court Lawyer's Creed; A Lawyer's Creed*, 70 OHIO ST. B. ASS'N RPTR. xli (1997).

<sup>184</sup> See N.J. SUP. CT. R. 1:40-1 (West 1998).

<sup>185</sup> See ARK. CODE ANN. § 16-7-101 (Michie 1997).



means to increase use of mediation. The corporate research, discussed above,<sup>186</sup> tells the story of lawyers who had been directed to consider mediation in their cases but who typically found a reason why mediation would not be appropriate. Those who ultimately began to recommend mediation regularly did so only after incentives regarding discovery were changed, after experience attending mediation sessions and after change in their office legal community. This research does not provide a strong endorsement for lawyer duties. It seems wise to await more research documenting changes in the bar in Colorado, Arkansas and elsewhere under their new provisions for attorneys before concluding that duties for lawyers to advise about mediation should be a part of the uniform or model mediation statute.

### *4. Provisions Authorizing Use of Mediation*

Hundreds of mediation statutes are largely limited to provisions that authorize or encourage the use of mediation by particular agencies.<sup>187</sup> At best, these provisions provide a legitimacy to mediation. If lawyers tend to resist use of mediation for the reasons discussed above, these laws resemble the lawyer's duties to advise clients about dispute resolution processes in terms of their likely effects. It seems best to await further evidence about their effectiveness before considering inclusion in a uniform or model law of a list of agencies encouraged to employ mediation. Once a uniform or model statute is enacted, legislators can make reference to that generic law when expressing a policy in favor of mediating particular kinds of cases if they deem it helpful to express support for use of mediation.

In sum, legislative efforts to encourage use of mediation through provisions for enforcement of mediation clauses and mediated agreements, recognition of new duties for lawyers or encouragement for particular agencies to consider reference to mediation do not seem to be especially promising means of increasing mediation use. Requiring mediation clauses in certain settlement agreements may be helpful, however. Overall, these provisions, at least as an avenue for expanding use of mediation, should be low on the list of priorities for a uniform or model mediation law drafting committee.

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<sup>186</sup> See *supra* Part II.

<sup>187</sup> See, e.g., GA. CODE ANN. § 50-8-7.1 (1997) (regarding the Department of Community Affairs); see also ROGERS & MCEWEN, *supra* note 5, at App. C (listing current statutes authorizing use of mediation).

#### IV. A RECIPE FOR STATUTORY PROVISIONS TO INCREASE USE AND ENCOURAGE MORE EFFECTIVE NEGOTIATIONS

The last two decades of growth in the use of mediation seem to yield two observations. First, experience may be the best teacher with respect to mediation and, to some degree, negotiation. A statute that authorizes courts and public agencies to require both lawyers and parties to participate in mediation seems to persuade them to increase its use and to engage jointly in negotiation. If the court or agency mediation is set early, lawyers will learn to negotiate earnestly earlier in their other cases. Second, regulation of mediation may make it so rigid and expensive that it is no better than the processes it was designed to replace. Statutes that create qualifications and standards for mediators should be imposed only if clearly shown to be worth their cost in terms of their benefits for the quality and fairness of the process or public confidence in the courts. Other approaches in law, such as duties to raise mediation with clients, codification of laws enforcing mediation clauses or mediated agreements or statutes that merely authorize use of mediation seem unlikely to be costly in terms of mediation use but there also is little evidence that they will contribute substantially to expanded use.

Advice about drafting the statute to encourage mediation and settlement approaches should be tempered. The drafters should weigh the other goals for mediation laws that are discussed elsewhere and determine whether to opt for these values over the goal of expanding use.

Finally, mediation should be encouraged as a means to another end—more effective negotiation. Drafters should keep in mind the promise that mediation use might eventually improve negotiations without mediators, particularly in expediting resolution and including the parties in the resolution of their own disputes. Mediation should be scheduled as early as practical, and the statute should encourage participation by both lawyers and parties. Carefully drafted laws can lead to improvement in the culture of disputing, not merely to the increased use of mediation.